No. 17298

In the
United States Court of Appeals
For the Ninth Circuit

CMAX, INC., also D. B. A. CITY MESSENGER OF HOLLYWOOD and CITY MESSENGER AIR EXPRESS,
Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,
Appellee.

Appellant's Opening Brief

PHIL JACOBSON,
H. J. BISCHOFF,
By H. J. BISCHOFF,
610 South Main Street
Suite 736
Los Angeles 14, California
Attorneys for Appellant.

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INTRODUCTORY STATEMENT

This is a claim by a common carrier for uncollected freight charges on shipments transported for defendant in 1955, 1956 and 1957. (Tr. 6). The complaint alleges that plaintiff is an "Air Freight Forwarder" as defined in 14 *Code of Federal Regulations* 296.2-a under operating authority granted to it by the Civil Aeronautics Board. (Tr. 4). That during the time the transportation service was rendered to defendant, plaintiff had on file with the said Board tariffs of its

rules and rates as required by 14 *Code of Federal Regulations* 221.4(h), 221.4(w) and 221.75. (Tr. 4-5). The complaint alleges that under the applicable tariffs on file with the Board, the lawful charges of plaintiff are $28,781.25, on which the defendant has paid $16,085.76, leaving a balance of $12,696.09 due and unpaid. (Tr. 6).

Plaintiff's claim arises under the provisions of section 403 of the *Civil Aeronautics Act of 1938,* 49 U.S.C. 483 and 1373. The District Court has jurisdiction under 28 U.S.C. 1337. (Tr. 3).

STATEMENT OF THE CASE

Under its claim, plaintiff seeks to recover additional charges for transportation services rendered by it to defendant in 1955, 1956 and 1957, known in transportation parlance as undercharges, consisting of the difference between the charges required to be assessed under its lawfully published tariffs, and the charges actually assessed at the time the services were rendered.

Plaintiff stated its claim in two counts:

The first count was on balance due for services rendered (Tr. 3-6) and the second count was for balance due on an open book account. (Tr. 7). In addition to traversing the material allegations of each count, defendant pleaded the same six affirmative defenses to each count. (Tr. 8-11). After the claims were at issue each party moved for summary judgment under rule 56 of the *Federal Rules of Civil Procedure.* (Tr.

12-13). Defendant combined with its motion for summary judgment, a motion for judgment on the pleadings, under Rule 12(c) of the *Federal Rules of Civil Procedure*. Defendant presented matters outside of the pleadings consisting of affidavit of John Harman, (Tr. 14-15) and request for admission of facts. (Tr. 16-17). Under these circumstances, defendant's motion should be treated as one for summary judgment. (Rule 12(c) *Federal Rules of Civil Procedure*).

Plaintiff in support of its motion and in reply to defendant's motion for summary judgment presented an Affidavit of Elliot S. Fullman showing the methods employed by it in keeping its book account with defendant. Attached to the affidavit and made a part thereof, are photostatic copies of ledger pages illustrating the entries made in its books. (Tr. 21-28).

On December 28, 1960, the trial court (Chief Judge Peirson M. Hall, presiding), rendered a memorandum of opinion and judgment dismissing count two of the complaint. (Tr. 29-30).

On January 23, 1961 Judgment was entered dismissing the claim of plaintiff on count two of its complaint. (Tr. 31-32).

On January 26, 1961, plaintiff filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the Second Count of the complaint and entering judgment in

favor of Defendant on January 23, 1961 pursuant to Rule 54(b) of *Federal Rules of Civil Procedure.* (Tr. 32).

ISSUES OF LAW

1. **The Question Here is Whether the Allegations of Plaintiff's Second Count State A Cognizable Claim on A "Book Account" As That Term is Used in Section 337(2) of the California Code of Civil Procedure.**

2. **Another Question Here is Whether the Entries Made by Plaintiff in Its Ledger Were Treated by Both Parties As An Open Account of Their Transactions.**

3. **The Loose Leaf Ledger Kept by Plaintiff Meets the Formal Requirement Laid Down by California Case Law, and the Recent Enactment of Section 337a Code of Civil Procedure. (Stat. 1959)**

4. **The Elapsed Time Between the Last Entry in Its Ledger in 1957 and the Entry of Undercharges in August, 1959, is No Bar of the Statute of Limitations.**

ARGUMENT

Supplementing the allegations in plaintiff's Second Count (Tr. 7), there are contained in this record prints of copies of plaintiff's ledger. One of these, marked Exhibit A, is a sheet of the ledger showing entries from January 8, 1957 to July 23, 1957. These entries were made in the regular course of business, and show the usual entries of a ledger, namely, the date of entry, item number, charges, credits and balance. (Tr. 23). No entries were made after July 23, 1957, until August 1959, when the additional charges here involved, were entered as alleged in paragraph 2 of Second Count. (Tr. 7).

Statements were rendered to defendant as charges were entered in the account, a typical example is Exhibit B. (Tr. 24). This shows the date charges were entered, item number, amount of charge, previous balance and balance due near the top of Exhibit B. (Tr. 24). To illustrate the continuous practice of rendering statements to defendant, the affidavit of Elliot S. Fullman shows an itemized list of book balances and statements to defendant. This is marked Exhibit D and covers a period beginning with May 12, 1955 and ending with November 14, 1955. (Tr. 25-28). This evidence is offered to show that defendant was made aware that plaintiff was keeping an open book record of the account with defendant, and that the transactions were not casual but continuous.

1. The Question Here is Whether the Allegations of Plaintiff's Second Count State A Cognizable Claim on A "Book Account" As That Term is Used in Section 337(2) of the California Code of Civil Procedure.

Before its amendment in 1917 section 337(2), *supra,* read as follows:

> "An action to recover a balance due upon a mutual, open and current account *or upon an open book-account.*" (Stat. 1907, Chap. 323, par. 1, Page 599). Emphasis supplied.

Up to this time only a "mutual, open and current account" was subject to the provisions of section 344 *Code of Civil Procedure.*[1]

Probably the first Appellate Court decision in California, construing the 1907 amendment of sec. 337(2) *Code of Civil Procedure,* held that the four-year statute of limitations did not apply to an "open book account" unless payments had been made on account. (*Merchants' Collection Agency v. Levi,* 32 Cal. App. 595, 163 P. 870, (Jan. 26, 1917).) The next important decision was *Furlow P. B. Co. v. Balboa L. & W. Co.,* 1921, 186 Cal. 754, 200 P. 625. This was an action on

[1]Section 344 Code of Civil Procedure. WHERE CAUSE OF ACTION ACCRUES ON MUTUAL ACCOUNT. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. (Enacted 1872)

an "open book account" and was held maintainable under the 1917 amendment, as well as under the 1907 amendment of section 337(2) *Code of Civil Procedure.*

The 1907 amendment of section 337(2), *supra,* bases the cause of action on a "balance due" upon an "open book account," whereas, the 1917 amendment of section 337(2) provides for,

> "an action to recover (1) upon a book account whether consisting of one or more entries."

The change in the statute was ably discussed by Mr. Justice Sturtevant of the First Appellate District in *Bailey v. Hoffman,* 1929, 99 Cal. App., 347, 278 P. 498. It was contended in that case, that under section 337(2) as amended in 1917, all items not falling within the four-year term were barred, because of the omission of the words "a balance due." The opinion of Judge Sturtevant in *Bailey v. Hoffman,* supra, points out that the contentions made call for statutory interpretation, and in referring to *Furlow v. Barlow,*[2] supra, stated that the Supreme Court of California in that case inferentially held that section 344 of the *Code of Civil Procedure* was made applicable to all accounts mentioned in section 337(2) as amended in 1917. We

[2]"The rule has long been settled in this state with reference to a mutual, open and current account mentioned in subdivision 2, section 337 of the Code of Civil Procedure, that the statute runs from the date of the last item shown in the account (*Carter v. Canty,* 181 Cal. 749, 186, P. 346.) The evident purpose of the amendment, subdivision 2, section 337 of the Code of Civil Procedure, was to put an "open book account" upon the same basis."

can do no better than to quote from the Court's opinion in *Bailey v. Hoffman,* supra, at page 351:

> STURTEVANT, J. 351: "In other words, the Court decided that the legislature sought to eliminate all distinctions in applying the statute of limitations to the two classes of accounts. When the amendment of 1917 was made we think that the legislature sought to eliminate any distinction as to accounts generally and sought to place actions to recover (1) upon a book account *whether open or not;* (Emphasis supplied) (2) upon an account stated; (3) a balance due upon a mutual, open, and current account all on the same basis. The omission of the word 'balance' is of negligible importance. It is expressly used regarding a mutual account. It is necessarily implied as to an account stated. In the sense of 'a total' it is necessarily implied as to a book account because to hold otherwise would authorize a plaintiff to sue for one item at a time as distinguished from suing on an account. As amended in 1917 the expression *'a book account' includes and refers to an open book account and also to a book account, which consists of entries on one side. As to the latter class it would be illogical to speak of 'a balance.'* (Emphasis supplied).

Unquestionably, it is the settled law in California, that an action on a "book account" is an action on a balance due, and not on the individual items making up the account. (*Moss v. Underwriters' Report, Inc.,* 1938, 12 Cal. 2d 266, 271, 83 P. 2d 503).

2. Another Question Here is Whether the Entries Made by Plaintiff in Its Ledger Were Treated by Both Parties As An Open Account of Their Transactions.

In the opening paragraphs of this argument, it was shown that continuous shipments were tendered to plaintiff by defendant, and that plaintiff's charges therefor were entered in its account books. Usually, within a period of seven days, the defendant was billed for plaintiff's charges. (Tr. 24).

An open account has been defined in 1 *Ruling Case Law* 207 as follows:

> "In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment."

This definition is quoted with approval in *Mercantile Trust Co. v. Doe,* 1914, 26 Cal. App. 246, 253, 146 P. 692 and by this Court in its recent decision of *Costello v. Bank of America National Trust & Sav. Ass'n.,* (1957), 246 F. 2d 807, 812. In the *Mercantile Trust Co.* Case, supra, it is further stated at p. 254, as follows:

> "It was not necessary that plaintiff should prove an express agreement by defendant that the account should be treated as an open account. As stated in 1 *Ruling Case Law,* page 207, 'it is usually disclosed by the account books of the owner

of the demand'; *and may be shown by the circumstances attending the dealings between the parties.*" (Emphasis supplied).

The situation here is so clearly established by the account books and the conduct of the parties that a book account was created, that there seems no point in citing cases. A reference to *Warda v. Schmidt,* 1956, 146 Cal. App. 2d 234, 237, 303 P. 2d 762, should suffice.

A case very similar on facts came before the Supreme Court of Iowa as early as 1896. This was an action for over charges by a shipper against a railroad, whereas the instant case is a claim for under charges by a carrier against a shipper. (*Higby et al. v. Burlington C. R. & N. Ry. Co.,* 1896, 99 Ia. 503, 68 N.W. 829, 830).[3] Cited as authority in 1 R.C.L. 207.

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[3]*Higby et al. v. Burlington C. R. & N. Ry. Co.,* (1896) 99 Ia. 503, 68 N. W. 829, 830. Head note 2: Plaintiff had made shipments over defendant's railroad during several years, and settled the freight bills presented by defendant. In each of the bills the company had charged defendant overweight. Held, that the several items of money paid defendant as freight on the excessive weight constituted an open account within the statute of limitations.

From the opinion of the Court at page 830: "It is said that plaintiffs are barred as to all items dated prior to August 10, 1889. It is urged that these items did not constitute an open, running account; that each item was a distinct transaction. There was no settlement regarding the payments of these items of over charges. They were never adjusted between the parties. We think these numerous items should be treated as constituting an open account."

3. The Loose Leaf Ledger Kept by Plaintiff Meets the Formal Requirements Laid Down by California Case Law, and the Recent Enactment of Section 337a Code of Civil Procedure. (Stat. 1959, Chap. 1010).

"The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." *Egan v. Bishop* (1935) 8 Cal. App. 2d 119, 122, 47 P. 2d 500; *Robin v. Smith* (1955), 132 Cal. App. 2d 288, 290-1, 282 P. 2d 135. "A book account is defined as a 'detailed statement kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' " (1 C.J. 597). "A necessary element is that the book shall show against whom and in whose favor the charges are made." (1 C.J. 598). *Wright v. Loaiza* (1918) 177 Cal. 605, 606-7, 171 P. 311; *Joslin v. Gertz* (1957) 155 C.A. 2d 62, 65, 317 P. 2d 155. "It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor." (*Joslin v. Gertz,* pp. 65-66, supra).

As appears from plaintiff's complaint, the transportation charges for which the defendant was billed

were less than the charges that accrued under plaintiff's published tariffs. (Tr. 6).

The applicable part of section 337a *Code of Civil Procedure* reads as follows:

> "and is kept in a reasonably permanent form and manner and (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner."

4. The Elapsed Time Between the Last Entry in Its Ledger in 1957 and the Entry of Undercharges in August, 1959, is No Bar of the Statute of Limitations.

We have heretofore shown under paragraph 1 of our argument that under the 1917 amendment to section 337(2) C.C.P., the four-year statute of limitation starts to run from the date of the last entry of an open book account. The entry for undercharges in August, 1959 is well within the four-year period.

We are unable to follow the reasoning of the trial court in dismissing plaintiff's Second Count. The trial court cited *Costello v. Bank of America National Trust & Sav. Ass'n.*, 1957, 246 F.2d 807, decided by this Court, on the point that to establish an open book account it is not only necessary to show the existence of book entries but also that both parties treated the records as an "open book account." We agree with this, as our

argument has shown. The trial court also cited *Groom v. Holm,* 1959, 176 Cal. App. 2d 310, but on what issue is not apparent. In a very brief memorandum of opinion the trial court stated as follows:

> "The undercharges of more than $12,000.00 were not entered in its books of account until at least August, 1959—two years and seven months after it had entered in the books the charges shown on air bills issued by it to the defendant. Such conduct does not amount to an open book account (*Code of Civil Procedure,* section 337a). See *Costello v. Bank of America* (9 Cir. 1957) 246 F. 2d 807, and *Groom v. Holm* (1959) 176 C.A. 2d 310."

It has been held in California that recovery lies on the account although more than four years has elapsed between some entries and the last entry. In *Rosati v. Heiman,* (1954), 126 Cal. App. 2d 51, 55-6, 271 P. 2d 953, the Court said:

> pp. 55-6: "The action is on the book account and is therefore on the entire account and not upon the separate items. It follows that the action may include items entered more than the statutory period prior to the entry of the last item. (*Gardner v. Rutherford,* 57 Cal. App. 2d 874, 136 P. 2d 48)."

Although the action is on the account, the items constitute the basis of the claim. Defendant charges the items are unenforceable claims because of misrepresentation, fraud, laches and estoppel. In the summary motion proceeding no showing was made on these is-

sues. All of the items of undercharges here involved constitute the difference between the plaintiff's published rates and the amount originally collected from the defendant. The law is too well settled to require extended discussion, and we will content ourselves by citing authorities on the issues raised by the affirmative defenses.

Tariffs bind both carriers and shippers with the force of law (*Lowden v. Simonds-Lonsdale Grain Co.,* 306 U.S. 516, 520, 59 S. Ct. 612, 614, 83 L. Ed. 953).

No act or omission of the carrier, except the running of the statute of limitations can estop or preclude it from enforcing payment of the full amount by a person liable therefor. (*L. & N. R. R. v. Central Iron Co.,* 265 U.S. 59; *L. & N. R. Co. v. Maxwell,* 237 U.S. 94, 98, 35 S. Ct. 494, 58 L. Ed. 853; *Pittsburgh C. C. & St. L. R. Co. v. Fink,* 250 U.S. 577, 40 S. Ct. 27, 63 L. Ed. 1151).

The law makes no distinction between innocent and intentional misquotations. (*F. Burkhart Mfg. Co. v. Fort Worth etc. Ry. Co.,* 149 Fed. 2d 909, 8th Cir. and cases cited). As stated by Mr. Justice Hughes in *L. & N. R. Co. v. Maxwell,* supra, in referring to a published rate, "deviation from it (filed rate) is not permitted upon any pretext."

The Interstate Commerce Act provides for time in which actions for undercharges must be brought by railroads (49 U.S.C.A. 16(3)(a)). Its counterpart, the

Civil Aeronautics Act of 1938 and 1958 has no similar provision, and the statute of limitations of the state in which the claim arose governs. This was also the rule before the Interstate Commerce Act contained section 16(3)(a). (*New York Central R. Co. v. Mutual Orange Distributors,* 251 Fed. 230 (1918), 9th Cir.

Collusion between the shipper and carrier to violate tariffs is no defense by the shipper in an action by a carrier to collect the full tariff charges (*National Carloading Corp. v. Atchison T. & S. F. Ry. Co.,* 1945, 150 Fed. 2d 210, 9th Cir.).

The inflexibility binding shippers to pay and carriers to collect the tariff charges under provisions of the Interstate Commerce Act apply equally under the Civil Aeronautics Act. (*United States v. Associated Air Transport, Inc.,* 1960, 275 Fed. 2d 827, 833).

The severe penalties imposed on shippers and carriers alike by the *Elkins Act,* 49 U.S.C.A. sections 41-43, in connection with interstate transportation by railroad, motor carriers and water carriers, has its counterpart for air transportation under 49 U.S.C.A. section 1472(a).

CONCLUSION

Under Rule 56(b) of the *Federal Rules of Civil Procedure,* the trial court was authorized to render judgment on all issues except the amount of money the plaintiff was entitled to recover. On the record presented here, plaintiff was entitled to a summary judgment. No appeal was taken for failure of the trial court to grant the motion of plaintiff, for the obvious reason that the order made was not appealable. Defendant combined a motion for judgment on the pleadings with its motion for summary judgment. Because defendant presented a request for admissions and an affidavit of one of its officers in support of its twin motions, the motion for judgment on the pleadings can only be treated as a motion for summary judgment under Rule 12(c) of the *Federal Rules of Civil Procedure.*

A comparison of the following two paragraphs of the trial court's memorandum (Tr. 30) are inconsistent:

> "Defendant's motion for judgment of dismissal on the pleadings as to plaintiff's second cause of action will be granted upon presentation of the proper form of judgment under the Rules."
>
> "That being so, the motions for both parties for summary judgment on plaintiff's second cause of action are moot, and on that ground are denied."

The pleadings, affidavits, request for admissions of both parties constituting the entire record are before this Court. It is hoped that under these circumstances, this Court will not only reverse the judgment rendered herein, but direct the trial court, to set matter for trial to determine only, the amount of money due plaintiff.

Respectfully submitted,

PHIL JACOBSON,
H. J. BISCHOFF,
By H. J. BISCHOFF,
Attorneys for Appellant.